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## THE DILEMMA OF THE DISOBEDIENT: A SOLUTION

JOHN H. DE BOISBLANC†

An earlier note<sup>1</sup> on civil disobedience considered contemporary civil disobedience from the viewpoints of several early and modern writers.<sup>2</sup> The civil rights movement, particularly the position expounded by Martin Luther King, Jr. within the movement, performs essentially the same function in the note as does the classic hypothetical case in law school. That is, the note evaluates a specific group of actions by the use of general principles, and as a result not only the actions "judged," but also in the process of application a great deal more is learned about the principles themselves. In this article again the position of Martin Luther King, Jr. is used as the "hypothetical case"; however, the emphasis is on the presentation and elucidation of certain principles, and not on the judgment of this particular instance of civil disobedience.

The earlier note suggests in conclusion that two central points of disagreement recur in the examined writings.<sup>3</sup> The second of these issues is the less philosophically perplexing, because in a real sense it is a "factual" question,<sup>4</sup> that is, one at least theoretically susceptible of some form of empirically verifiable answer in a given society at a given time.

The second issue focuses on the consequences of disobedience, and asks, even assuming disobedience is "justified" in this instance, if such disobedience will cause all law to fall into disrepute, and thus promote disorder which is more onerous than the original grievance. Aquinas speaks of yielding the right

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1. Note, *Contemporary Civil Disobedience: Selected Early and Modern Viewpoints*, 41 IND. L.J. 477 (1966).

2. The early writers represent three general schools of natural law philosophy—ancient (Plato), medieval (Thomas Aquinas), and classical (John Locke). The four modern viewpoints form a continuum from strong disapproval [Waldman, *Civil Rights—Yes; Civil Disobedience—No* (*A Reply to Dr. Martin Luther King*), 37 N.Y.S.B.J. 331 (1965)] through two middle positions [Rawls, *Legal Obligation and the Duty of Fair Play*, in *LAW AND PHILOSOPHY* 3 (Hook ed. 1964); Hook, *THE PARADOXES OF FREEDOM* 106 (1962)] to strong approval [Keeton, *The Morality of Civil Disobedience*, 43 TEXAS L. REV. 507 (1965)].

3. See Note, *supra* note 1, at 504-05.

4. In *Truth and Politics*, The New Yorker, Feb. 25, 1967, pp. 49, 54, Hannah Arendt makes this distinction between "fact" and "opinion":

Facts are beyond agreement and consent, and all talk about them—all exchanges of opinion based on correct information—will contribute nothing to their establishment. Unwelcome opinion can be argued with, rejected, or compromised upon, but unwelcome facts possess an infuriating stubbornness that nothing can move except plain lies. The trouble is that factual truth, like all other truth, peremptorily claims to be acknowledged and precludes debate. . . .

to "avoid scandal or disturbance" or "inflicting a more grievous hurt," and Waldman fears "you cannot build a fence around this kind of program." Unlike the first issue, this question is to a large extent a "factual" one of whether disobedience of some laws, under certain circumstances, will create disrespect for all law.<sup>5</sup>

Obviously the moral or philosophical basis of a society's commitment to the rule of law and the "rightness" of the disobedience will be important factors in determining whether an act of civil disobedience will "cause all law to fall into disrepute." However, the question itself—whether the act will lead to disrespect for law in general—is still a factual (albeit very difficult) one in the sense that a yes or no is at least possible. Only after one concludes that the action will create a disrespect for all law does this question present a value conflict—is the rule of law worth sacrificing to promote the value that requires the disobedience?

The other central point of disagreement directly raises a moral dilemma:

[This] issue involves the "rightness" of civil disobedience, in the sense of whether a citizen "owes" obedience to society as a price he must pay for the benefits he receives from it. Plato has Socrates raise this question when he quotes the laws as asking "Was that our agreement? Or was it that you would submit to whatever judgments the state should pronounce?" Rawls calls it the "duty of fair play"; it is Locke's "social contract," and Hook's "democratic process" whereby everyone is free to agitate for his position, but once the vote is taken all must submit to the decision. It is basically the principle of exchange, or *quid pro quo*; in terms applicable to any government, it is obedience given in exchange for benefits accepted; in democratic terminology, it is the agreement to submit to every majority decision even when a particular decision is disapproved, in exchange for like submission by others even when they disagree with a decision. Putting this concept in terms of the question of contemporary civil disobedience, those writers who tend to disapprove of civil disobedience would stress the logic of the position that civil rights proponents cannot expect their opponents to submit to civil rights laws which the latter consider unjust, if the civil rights proponents themselves refuse to obey the law when the decision goes against them. On the other hand,

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5. Note, *supra* note 1, at 505.

those favoring civil disobedience would emphasize that in accepting punishment for the disobedience, the disobedients make a sacrifice, admittedly of a different sort, in exchange for the expected obedience of the rest of society, and thus do not get a "free ride" in society. Of course this does not obviate the point that others in society submit to law in expectation of receiving like obedience from the protestors, and not in exchange for the protestors' willingness to accept punishment for disobedience.<sup>6</sup>

Thus the dilemma of a would-be disobedient, narrowly stated, is: *What right have I to expect my opponents to obey laws that they disapprove, if I consider myself free to break laws that I disapprove?* In terms of contemporary civil disobedience, is not Martin Luther King placing himself in a hopelessly contradictory position when he calls upon segregationists to obey the law of the land while at the same time asserting his right to break the law if he feels it is "unjust"? (This situation should clearly be distinguished from the case where the disobedient frankly abandons the legal system—in effect "gets out of the game"—and at least by implication leaves his opponents free to do likewise. In contrast, in the situation under consideration the disobedient is saying that the rules still apply, but for some reason are not applicable to him under the circumstances.)

Sidney Hook, in *The Paradoxes of Freedom*,<sup>7</sup> raises this question within the context of a democratic society. He first defines a "democratic society" as an attempt to "escape the dilemma between the acceptance of tyranny, on the one hand, and anarchy, on the other."<sup>8</sup> Tyranny is avoided because the minority is free to convince the majority of the wrongness of a law, and anarchy is avoided because once a decision is made by the majority, all must obey the decision, that is, the law, until the minority becomes the majority on the issue and changes the law.<sup>9</sup> After making a distinction similar to the one suggested in the preceding paragraph, he raises the question of disobedience within a democratic society, that is, one can frankly admit he is abandoning the democratic ideal for a "higher law"<sup>10</sup> (thus presumably leaving his opponents also free of the agreement). After making this distinction, he asks the crucial question: "But how can a *democrat* defend such unlawful action?"<sup>11</sup>

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6. *Id.* at 504.

7. *Op. cit. supra* note 2.

8. *Id.* at 112.

9. *Id.* at 112-13.

10. *Id.* at 117-18.

11. *Id.* at 117 (Emphasis in original).

He answers:

It seems to me he can defend it *only* if he willingly accepts the punishment entailed by his defiance of the law, only if he does not seek to escape or subvert or physically resist it. If he engages in any kind of resistance to the punitive process of the law which follows upon his sentence of legal guilt, he has in principle embarked upon a policy of revolutionary overthrow.<sup>12</sup>

This answer is not without appeal, but it leaves one wishing that Hook had said more. The central contradictory position of the disobedient remains unresolved, and this is true for any legal system, not just for a democratic system. The problem is that in any legal system each individual is calling for others to submit to laws that they disapprove in exchange for his agreement to do likewise, and not in exchange for his willingness to go to jail. Using Hook's terminology, the "democratic compromise" is an agreement to submit to every law enacted, even those disapproved, in exchange for like submission by others. In the context of another society Plato has Socrates quote the laws: "Was that our agreement? Or was it that you would submit to whatever judgments the state should pronounce?"<sup>13</sup>

Is then a civil disobedient, who expects obedience to law from his opponents, in a hopelessly contradictory position? Is not the person who approves of disobedience by civil rights groups, while calling upon segregationists to obey desegregation laws and court orders, in reality applying a double standard for behavior, and should he not have the intellectual honesty to admit it?

There is a way to avoid the contradiction, a solution that is implied, but not developed, in Hook's position.<sup>14</sup> In effect Hook is saying that a person can disobey some laws yet remain within a democratic system by substituting the willingness to accept punishment for the normally expected obedience to disapproved laws. This idea of substituting punishment for obedience gives a hint to a solution—a solution that involves restating the reciprocal legal obligations in terms suggestive of traditional Anglo-American contract doctrine. The contradiction dissolves if one views the mutual agreement among citizens to be as follows: *Each citizen agrees to obey all laws, including those laws he disapproves, provided, however, each citizen reserves the right to disobey any law that is absolutely incompatible with his deeply-held moral conviction, and to substitute submission to punishment in lieu of obedience to that law.*

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12. *Ibid.*

13. See text accompanying note 6 *supra*.

14. See text accompanying note 12 *supra*.

This agreement is analogous to a contract by which each party agrees to perform a number of acts with the further provision that each party reserves the right to pay damages in lieu of performing some of the promised acts. The crucial difference between a contract containing this reservation and a contract lacking it is that in the latter case a party who refuses to perform certain promises cannot compel the other party to perform his part of the bargain,<sup>15</sup> whereas in the former situation the party who refuses to perform these promises, and instead pays the money damages, has every right to expect the other party to perform his promises, except where he too chooses to pay damages.<sup>16</sup>

Three implications of this agreement immediately become evident. (1) The whole set of mutual obligations does not collapse as a result of one obligor's refusal to render "specific performance" as to a few of the obligations. (2) While the choice not to perform is subjective, it does not amount to saying "I will perform if I feel like it," because the right to "substitute damages" exists only where the law is incompatible with a deeply-held moral conviction. (3) It is possible to reach a point where the parties have so frequently chosen to pay damages in lieu of performance that the agreement can no longer serve its original purpose. These implications will be discussed later.

15. 17 AM. JUR. 2d Contracts § 365 (1964):

*Effect of first breach.* As a rule, a party first guilty of a substantial or material breach of contract cannot complain if the other party thereafter refuses to perform. He can neither insist on performance by the other party nor maintain an action against the other party for a subsequent failure to perform. (Footnotes omitted.)

Of course the other party may be under some sort of "duty" to continue performance under the doctrine of "mitigation of damages" or "avoidable consequences," but this only means "if he fails to make the reasonable effort, with the result that his injury is greater than it would otherwise have been, he cannot recover judgment for the amount of this avoidable and unnecessary increase. The law does not penalize his inaction; it merely does nothing to compensate him for the loss that he helped to cause by not avoiding it." 5 CORBIN, CONTRACTS § 1039 (1964).

Furthermore, if the breach is a "partial breach" rather than a "total breach," the injured party may still have to perform. "A total breach of contract is a non-performance of duty that is so material and important as to justify the injured party in regarding the whole transaction as at an end." 4 CORBIN, CONTRACTS § 964 (1951).

Here we are assuming the breach concerns matters of consequence, matters which are "material and important." One could say that in most contracts there is an "implied condition" that minor breaches will be compensated for by money damages, and will not result in termination of mutual duties to perform.

16. 17 AM. JUR. 2d Contracts § 363 (1964):

*Promises or obligations in the alternative or disjunctive.* Where a promise is in the disjunctive, ordinarily the promisor may elect which act he will perform. The obligation may be discharged by the performance of either of the enumerated acts at the election of the obligor. (Footnotes omitted.)

17A C.J.S. Contracts § 455 (1939):

*Alternative Promises and Election.* If . . . the promisor . . . has the right to elect which of the alternative promises he will perform, he can be charged with a breach only when he refuses to perform both. . . . (Footnotes omitted.)

The obvious question present from the beginning is whether a contract analogy is apt to give a realistic picture of the actual situation. Probably not even a sophomore studying Locke in a basic political science course believes in an historical "social contract," and indeed in all likelihood most civil disobedients do not think in terms of having entered into a contract or agreement with others in the society. However, conceding all of this, a contract analogy does not unduly distort the social and moral reality of the situation. It must be kept in mind from the outset that it is not being said that there literally *is* a contract among the citizens, but only that their mutual obligations can be viewed as, and in a sense are, a tacit agreement that is in many ways *analogous* to a legal contract. Unquestionably any attempt to abstract principles from a series of relationships inevitably is done at some cost in terms of "concrete reality,"<sup>17</sup> but man has no other way of dealing with ideas, and therefore the task is to make the abstractions conform as closely as possible to the concrete reality. There are three reasons why it does not distort reality unduly to use this idea of an agreement containing a reservation. First, if a number of people consciously conform to a set of rules without having had any communication among themselves, it is not stretching the commonly accepted use of the words to say that they have "tacitly agreed" to follow the rules. For example, if a group of people in an apartment building make it a practice not to play televisions and radios loudly at night, it can be said that they have tacitly agreed to keep down the noise. It is important to remember that the "agreement" of which we are speaking is not an agreement to pay taxes, or to send one's children to school, that is, it is not an agreement to obey an individual law, but rather, it is an agreement to accept the whole legal system on certain terms.

Secondly, assuming one is willing to view the relationship among citizens as an agreement to obey the laws on certain terms, it is not unrealistic to assume that most citizens have a vague notion that if a law is too immoral they will not obey it. In fact, almost by definition, unless one takes the absolutist position of obedience to *all* law, including laws such as those that effected the Nazi's "final solution to the Jewish problem," one "reserves" the right, in the name of some higher principle, to refuse to obey laws that go beyond a certain point. Thus it is reasonable to suppose that this reservation exists, and on the analogy of the contract containing a reservation, such implied reservation is not incompatible with the agreement to obey the laws generally.

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17. For an excellent discussion of the loss of contact with "concrete reality" resulting from Western Man's propensity to abstract, see BARRETT, *IRRATIONAL MAN passim* (1958).

Finally, even if one is not willing to concede that a legal system resembles an agreement, or that such reservation in fact exists, one can still view the whole matter from the standpoint of an individual seeking a position that he is willing to universalize. Even if a legal system in no way resembles an agreement among citizens, a person can still say "I agree to obey all laws except those with which I strongly disagree, and in such case I shall accept the punishment for disobedience; furthermore, I approve of all other citizens doing likewise."<sup>18</sup> Therefore, aside from any question of a legal system consisting of some sort of agreement among citizens, the proposition can be evaluated as an individual moral position.

Accepting the proposition either as an agreement that does in fact reflect the social reality, or as a moral posture of an individual, is it proper to draw analogies from the concept of a legal contract? Some legal philosophers have used the "game" analogy<sup>19</sup> to elucidate various aspects of a legal system, and there is no inherent reason why a contract analogy cannot serve the same purpose. Furthermore, there are two reasons why the contract analogy is more suitable than the game analogy for our purposes. In the first place fundamental principles of contract law contain a large element of "rightness," that is, the rules are not simply arbitrarily constructed guidelines, but rather, are an attempt to achieve a condition of fairness.<sup>20</sup> In contrast, the rules of a game are largely arbitrary, with perhaps the only element of fairness being the general condition that the rules are to be equally applied to all participants. Thus the contract is a better model than the game to illustrate the morality involved in the relationship among citizens. Secondly, the idea of parties working together for mutually beneficial results, as in a contract, conforms more closely to our traditional concept of a legal system<sup>21</sup> than

18. Of course one may *disagree* with his position, but this does not amount to saying that it is of no individual moral stance at all.

19. For examples of this see, e.g., ROSS, *ON LAW AND JUSTICE* 11-18 (1959); HART, *THE CONCEPT OF LAW* *passim* (1961).

20. See, e.g., 1 CORBIN, *CONTRACTS* § 1 (1963):

[T]he law of contracts attempts the realization of reasonable expectations that have been induced by the making of a promise. Doubtless, this is not the only purpose by which men have been motivated in creating the law of contracts; but it is believed to be the main underlying purpose, and it is believed that an understanding of many of the existing rules . . . require a lively consciousness of this underlying purpose.

The law does not attempt the realization of every expectation that has been induced by a promise; the expectation must be a reasonable one.

21. The classic statement of a legal system as a cooperative mutually beneficial undertaking is of course the Preamble to the Constitution of the United States of America: We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.



does the idea of parties competing one with the other "to win the game." In a game the rules tell the participant how he must play in order to win, while in a society laws are not set up so that one citizen will triumph over another (although of course some citizens may profit far more from the rules than do other citizens), but rather, so that they can continue to live together in an on-going enterprise—the society.<sup>22</sup> A contract is much the same; it establishes reciprocal rights and duties, with the hope of profit for all parties. Therefore, the use of the contract analogy to evaluate the relationship of individuals in a society is not apt in itself to give a false picture of this relationship.

Turning now to the first of the three implications of this proposition,<sup>23</sup> it was suggested that if the agreement of each citizen is to abide by all laws, even those he disapproves, with a reservation that allows him to substitute submission to punishment for obedience in the case of very grave moral disapproval, then the whole system of obligations does not collapse when a citizen chooses to "pay damages in lieu of specific performance" in regard to a few laws. Again, using the analogy of a contract, if the agreement contains a provision allowing each party to pay damages in lieu of performance on some of the items and a party ex-

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The seeming inevitability of the view of a legal system as an attempt to achieve purposes beyond the purpose of adherence to its rules as an end in itself can be seen in the fact that both Hart and Fuller, in their famous "positivism verses morality of law" debate, view legal systems as attempts to meet certain human needs. Hart, the positivist, in *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 604 (1958), states that laws other than criminal laws "provide facilities more or less elaborate for individuals to create structures of rights and duties for the conduct of life within the coercive framework of the law." See also Hart's discussion of the necessity for any legal system to fulfill certain basic human needs. *Id.* at 622-23. "[S]uch rules [forbidding the free use of violence and constituting the minimum form of property] are so fundamental that if a legal system did not have them there would be no point in having any other rules at all." *Id.* at 623.

Fuller's view of a legal system as an instrument to fulfill human purposes is of course one of the basic points of his position, and is evident throughout his article, *Positivism and Fidelity to Law—A reply to Professor Hart*, 71 HARV. L. REV. 630 (1958). Note, for example, this passage at page 642:

No written constitution can be self-executing. To be effective it requires not merely the respectful deference we show for ordinary legal enactments, but that willing convergence of effort we give to moral principles in which we have an active belief. . . . All this amounts to saying that to be effective a written constitution must be accepted, at least provisionally, not just as law, but as good law.

22. Even the existence of a group of laws which single out a minority for oppression does not usually obviate this characterization of a legal system as a group of rules which tells each citizen how he can "have a share" in the society, for even the oppressive laws give the members of the minority a niche in the society, albeit a relatively disadvantageous niche. Naturally it is possible that the oppression will reach the point, perhaps well short of herding into concentration camps, where the oppressed group will feel it no longer has any share in the society. In such case the society can be considered a cooperative enterprise only involving the relatively unoppressed balance of the population.

23. See text following note 16 *supra* for the three implications.

ercises this option, he still rightly expects the other party to render specific performance on all items, except where he too feels compelled to exercise the same option. On the other hand, if the contract contains no such provision and a party refuses to perform, even though he may offer to pay damages in lieu thereof, the other party is not obligated to accept the substituted performance and can consider the contract breached.<sup>24</sup> Likewise, if a citizen does not consider this right to substitute punishment for obedience to be a part of his agreement to obey the laws and he feels compelled to disobey a particular law, he cannot with consistency call upon his fellow citizens to continue to obey the laws. If the agreement is purely and simply to obey all laws and a citizen disobeys a law, he has broken his agreement, and he places himself in a privileged position if he believes that others are still under a duty to obey all laws. In contrast, if he concedes the same right to every individual to disobey any law that the individual finds to be absolutely incompatible with his concept of morality, then he can with consistency demand continued obedience from the others until they are faced with an instance of absolute conflict of law and morality.

The second implication is that while the choice not to obey is subjective, it does not amount to leaving obedience to the whim of each citizen, for the right to disobey exists only if the law is incompatible with a deeply-held moral conviction and the citizen is willing to accept punishment for his disobedience. The condition of incompatibility with a deeply-held moral conviction means that the citizen has no right to disobey merely because he has come out on the short end of a legislative or judicial decision, or even because he feels strongly that a law is unwise. For example, a person may be unshakably convinced that progressive taxation retards productivity and is generally unfair, yet he is obligated to obey, unless he feels that it is not merely unwise and unfair, but is an abomination that his conscience will not permit him to obey. The central point is that obedience is the expected behavior, and his conscience must overcome this strong presumption in favor of obedience if he is to choose disobedience. Looking at the contract analogy again, the object of the contract is performance by all parties, and exercise of the option to pay damages should be limited as much as possible. Likewise the object (although not the "final purpose") of a legal system is to have every citizen conform to certain rules, even when he would prefer

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24. 17 AM. JUR. 2d *Contracts* § 370 (1964):

*Generally.* [I]t is clear that a person cannot be compelled to take and use one thing when he bargained for another and declines to receive the substitute tendered. He has the right to have the thing contracted for in the form agreed upon and cannot be put off with something different even though, in a strict pecuniary sense, it is more valuable. (Footnotes omitted.)

to do otherwise; all that the reservation does is to provide a "safety valve" whereby an individual may obey an undeniable dictate of his conscience that conflicts with a particular law, without thereby rejecting the entire legal system.

The purpose of accepting punishment differs in some respects from that of paying damages in the contract. In the contract the party receiving the damages gets money in the place of performance, and while he may have preferred the performance, at least he does receive some benefit from the other party. However, no such immediate benefit passes to the other members of the society when a citizen chooses to submit to punishment rather than give the desired obedience. In the contract one function of requiring damages is likely to be to discourage non-performance, and in a like manner the condition of accepting punishment discourages disobedience by forcing a thorough examination of conscience before the choice to disobey. Probably the most important function of accepting punishment is to serve as an objective sign to the others of the disobedient's good faith, and to reduce any dissatisfaction among the others that might result if they felt the disobedient was getting a "free ride."<sup>25</sup>

The third implication is that if enough members of the society choose frequently enough to accept punishment in lieu of obedience, the society will break down. Likewise in a contract if all parties begin paying damages in lieu of specific performance on most items, the objective for which the contract was entered into will be frustrated. This conclusion does not condemn the proposition, for it is another way of stating that if various groups within a society do not share a certain minimum of the same principles and goals, the society<sup>26</sup> will not hold together. Varying degrees of this phenomenon can be seen in several contemporary societies: the Flemish-Walloon split in Belgium;<sup>27</sup> the Indian-Pakistani separation after the British withdrawal resulting from the Hindu-Moslem conflict;<sup>28</sup> and (perhaps to a lesser extent) the British-French rivalry in

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25. For a discussion of legal obligation as a duty based on mutual sacrifices on the part of all citizens, see Rawls, *supra* note 2.

26. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1961) gives the following as one definition of "society":

4b: a community, nation, or broad grouping of people having common traditions, institutions, and collective activities and interests.

27. ALBRECHT-CARRIE, *ONE EUROPE* 93 (1965):

[T]he subsequent story of Belgium has been considerably troubled by the existence in that country of the two distinct ethnic groups that have been mentioned: the Flemish have struggled for and increasingly secured cultural parity with the French-speaking Walloon. Yet Belgium still exists and it is easier to conceive of its becoming severed into two parts than of the whole or either part becoming merged into its neighbors.

28. BRECHER, *THE NEW STATES OF ASIA* 31-37 (1963).

Canada.<sup>29</sup> Another instance, related to the civil rights movement, is the Black Muslim "Nation" which often speaks of complete separation from the rest of American society.<sup>30</sup>

Of course a dominant group within a state can impose its will upon a minority (or even a majority), at least for a time, and thus through force keep order and prevent the physical disintegration of the state. However, to suggest that any member of the oppressed or coerced group feels any obligation toward the state is another thing—there is no agreement at all,<sup>31</sup> and in contract terminology it is a contract made under "duress" which is a voidable contract at best.<sup>32</sup>

However, in fact in most societies this breakdown does not occur because the citizens share enough common values and goals, and likewise in the vast majority of cases citizens do not feel compelled to disobey and pay the penalty. The point is that any position, short of the absolutist position that all enacted laws are to be obeyed regardless of what one may think of the laws by other standards,<sup>33</sup> potentially can result in the breakdown of the society. For example, under the position that every citizen must obey all laws until he is willing to reject the whole legal system, should enough citizens make the decision to break totally with the society, it will disintegrate. Thus the unavoidable choice is between two positions: that of the legal absolutist<sup>34</sup> which, while it is

29. CLARK, CANADA: THE UNEASY NEIGHBOR *passim* (1965). The following two passages are illuminative:

Yet Canada in truth is filled with conflict—so much so that a government-appointed commission was impelled in 1965 to express concern over "serious danger" to its continued existence as a nation. The specific and immediate fear was caused by hostility between English Canadians and French Canadians.

*Id.* at vii.

What French Canada wants from the rest of the country is acceptance that Quebec is not simply another province, like Ontario or British Columbia, but that it is a way of life: in effect, a nation with a soul of its own that must be maintained and protected from mightier forces.

*Id.* at 31.

30. SOBEL, CIVIL RIGHTS 1960-63 (1964):

In his speech [at the Black Muslims' annual convention, Chicago, Feb. 26, 1963] Malcolm X demanded that the government give Negroes "some states" and "everything we need to start our own independent civilization."

31. Of course there would be an agreement among the members of the dominant group itself which allows them to carry on the oppression as a "cooperative enterprise." For a discussion of the question of an oppressed group within a society, see note 22 *supra*.

32. 17 AM. JUR. 2d *Contracts* § 153 (1964):

*Duress, coercion, intimidation, or threats.* Freedom of will is essential to the validity of an agreement. . . . An agreement obtained by duress, coercion, or intimidation is invalid, since the party coerced is not exercising his free will. . . .

33. A person taking this position is in effect adopting obedience to enacted law as his "ultimate moral principle." He may see that particular laws, or even the whole legal system, conflict with other moral principles he holds, but he is willing to sacrifice these for the principle of obedience to enacted law.

34. See note 33 *supra*.

maintained, assures the preservation of the legal system, but at a potential cost of all other values, and a general position (of which the one discussed in this article is an example) that allows certain values to override the value of obedience to law, but at a potential cost of the whole legal system.<sup>35</sup> The hope of those taking the latter position is that the conflict between these values and the legal system will never be great enough to force the actual payment of this potential cost. Once one takes this non-legal absolutist, general position, the value of the specific position outlined in this article becomes apparent. It allows one to avoid choosing between a particular moral principle and the whole legal system every time there is a very serious conflict—he simply substitutes “damages” for “specific performance” in regard to the offensive law, while continuing to obey all other laws, and calling on all others to continue to “specifically perform,” except where they too feel compelled to make the same substitution regarding another law.

Let us now use this proposition—that each citizen agrees to obey all enacted laws, including those laws he disapproves, provided, however, each citizen reserves the right to disobey any law that is absolutely incompatible with a deeply-held moral conviction, and to substitute submission to punishment in lieu of obedience to this particular law—to “test” the case of contemporary civil disobedience as presented by Martin Luther King, Jr., keeping in mind that this “testing” has the additional function of helping to make clear the implications of the proposition itself.<sup>36</sup>

Dr. King’s position on civil disobedience<sup>37</sup> is concisely presented in the following excerpt from his best-known statement on disobedience, the “Letter from a Birmingham Jail”:

[T]here are two types of laws: just and unjust. I would be the first to advocate obeying just laws. One has not only a legal but a moral responsibility to obey just laws. Conversely, one has a moral responsibility to disobey unjust laws. I would agree with St. Augustine that “an unjust law is no law at all.”

. . . A just law is a man-made code that squares with the moral law or the law of God. An unjust law is a code that is out of harmony with the moral law. To put it in terms of St.

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35. For consideration of the antinomy between “order” and “justice,” see Hall, *From Legal Theory to Integrative Jurisprudence*, 33 U. CINC. L. REV. 153, 172-91 (1964).

36. For this dual function of the hypothetical case, see the opening paragraph of this article.

37. Recently Dr. King has also turned his attention to the war in Viet Nam, suggesting that civil disobedience is a legitimate tool of those who oppose the war; however, there is no indication that he has changed his philosophical justification of civil disobedience. For a more detailed discussion of the characteristics of civil disobedience in the Civil Rights Movement and King’s position, see Note, *supra* note 1, at 478-81.

Thomas Aquinas: "An unjust law is a human law that is not rooted in eternal law and natural law. . . ."

. . . In no sense do I advocate evading or defying the law, as would the rabid segregationist. That would lead to anarchy. One who breaks an unjust law must do so openly, lovingly, and with a willingness to accept the penalty. [An individual who does this] to arouse the conscience of the community over its injustice, is in reality expressing the highest respect for law.<sup>38</sup>

Thus in 1963 Dr. King limited the right of disobedience to laws unjust in themselves; however, in 1965 he indicated that he would extend this right to laws which are not as such unjust, if disobedience of some just laws is the only means "to call attention to the injustices, so that society will seek to rid itself of that overall injustice. Again . . . there must be a willingness to accept the penalty."<sup>39</sup>

In regard to laws considered unjust in themselves, Dr. King's position apparently meets the requirements of the proposition presented in this article—he would disobey only those laws that are "out of harmony with the moral law." While he does not state it explicitly, the use of such terms as "moral law" and "law of God" indicates that the "unjust" law must be a law that presents a very deep and basic conflict with one's conscience. Furthermore, Dr. King states explicitly that the disobedient must be willing to accept the penalty in lieu of obedience. Moreover, he is not inconsistent when he states "in no sense do I advocate evading or defying the law, as would the rabid segregationist," if by the words "evading or defying" he means an unwillingness to pay the penalty. Thus indeed Dr. King can condemn the disobedience of segregationists<sup>40</sup> who would disobey the law and attempt to avoid punishment. However, by the same standard he cannot condemn their disobedience if the disobeyed desegregation laws strongly conflict with their sincerely-held moral convictions and they are willing to pay the penalty for disobedience (although of course he will disagree with their moral convictions).

When Dr. King advocates disobedience of laws not considered unjust, he undoubtedly has abandoned the agreement, even though he is still willing to pay the penalty, because he is not limiting his disobedience to only those laws that are incompatible with a deeply-held moral belief. In reality this disobedience either is meant to be revolutionary or is not

38. KING, WHY WE CAN'T WAIT 84-86 (1963).

39. King, *The Civil Rights Struggle in the United States Today*, 20 RECORD SUPPL. 24 (1965).

40. Of course he primarily condemns them for supporting segregation, but here we are speaking of condemning their disobedience of law per se.

meant as a challenge to the legal system or to any law as such. If the former alternative is the situation, and disobedience of a particular law is simply a convenient way to attack the entire legal system, Dr. King has taken the position of one who is at war with the legal system.<sup>41</sup> If this is his true intent, presumably he considers his opponents also free to ignore the dictates of the legal system. However, since this revolutionary position seems totally inconsistent with his express statements,<sup>42</sup> and since he still recognizes the validity of the penalty, the other alternative seems more probable. In other words, he is creating a disturbance to call attention to problems not yet covered by the legal system, and the disobedience of a law is only a convenient method of causing this disturbance. The obvious implication of a position that permits law to be used in such manner is that law does not create much obligation of obedience per se, and is only to be obeyed when it happens to coincide with a citizen's position or when obedience is more convenient than disobedience. Of course if this position is taken, no effective appeal can be made to the segregationists' duty of fidelity to law.

In closing it is well to state again a distinction touched upon at several points in this article. In any legal system an appeal to others to adopt a certain course of conduct may be made either in the hope that they will be persuaded that it is "right" or upon the proposition that the law, which requires the conduct, carries with it an obligation of obedience created by the agreement we have been discussing. Thus, Dr. King calls upon all citizens to conduct themselves in a certain way first because it is demanded by certain principles which he holds and then, realizing that not all citizens share these principles with him, because the conduct is required by the principle of obligation to law. How Dr. King, or anyone, can make this second demand, while himself disobeying certain laws, has been the subject of this article.

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41. For this distinction, see text accompanying note 10 *supra* and text preceding note 7 *supra*.

42. See text accompanying note 38 *supra*.

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